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NO. 75-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRAIL TRANSPORTATION COMPANY ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT, LOCAL NO. 988, TEAMSTERS, FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES

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SUBJECT INDEX

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
District Court Rulings	3
Court of Appeals Rulings	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. AN EMPLOYEE WHO IS GUILTY OF SERIOUS THEFT OF COMPANY PROPERTY ON THE JOB DOES NOT PRESENT A CLAIM UNDER TITLE VII BY OBJECTING TO HIS DISCHARGE ON THE GROUND THAT ANOTHER EMPLOYEE OF ANOTHER RACE WHO WAS EQUALLY CULPABLE WAS NOT DISCHARGED.	7
ARGUMENT	12
II. 42 U.S.C. § 1981 DOES NOT AFFORD TO WHITE PERSONS A CAUSE OF ACTION FOR ALLEGED FAILURE TO ACCORD EQUALITY WITH BLACK PERSONS.	12
CONCLUSION	40

LIST OF AUTHORITIES

CASES

	Page
Barrow v. Jackson, 346 U.S. 249, 259 (1953)	39
Civil Rights Cases, 109 U.S. 3	14
DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (C.A. 2, 1975)	39
Dred Scott, 19 How. 393 (1857)	35
Emporium Capwell v. Western Addition Community Organization; NLRB v. Western Addition Community Organization, 95 S.Ct. 977 (1975)	9
Guerra v. Manchester Terminal, 350 F. Supp. 529 (S.D. Tex. 1972) affd. on this point 498 F.2d 641 (C.A. 5, 1974)	39

CASES

	Page
Jones v. Alfred H. Mayer, 392 U.S. 409, 439, 441 (1968)	14
League of Academic Women v. Regents, 343 F. Supp. 636 (N.C. Cal. 1972)	38
Louisiana v. United States, 380 U.S. 145 (1965)	15
McDonald Douglas Corp. v. Green, 411 U.S. 792	6, 8, 9, 10, 11, 12
NLRB v. Fansteel Metallurigical Corp., 306 U.S. 240 (1939)	11
San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247-48 (1959)	9
Southern Steamship Co. v. N.L.R.B., 316 U.S. 31 (1942)	9
Sullivan v. Little Hunting Park, Inc., 396 U.S. 235, 237 1969)	39, 40
Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 19-20 (1971)	15
U. S. v. Wong Kim Ark, 169 U.S. 649 (1898)	35

UNITED STATES CONSTITUTION

Thirteenth Amendment	14, 24, 25, 26, 36, 37
Fourteenth Amendment	35, 36, 38, 39

UNITED STATES STATUTES

Title VII of the Civil Rights Act of 1964	1, 5, 6, 7, 8, 9, 10, 12
18 U.S.C. §659	8
42 U.S.C. §1981	1, 6, 12, 13, 38, 39, 40
42 U.S.C. §1982	39

TEXAS PENAL CODE

Article 12.34	3
Article 31.03	3

MISCELLANEOUS

	Page
71 Cong. Globe 182	32
71 Cong. Globe 183	33
71 Cong. Globe 211	16, 22
71 Cong. Globe 212	21
71 Cong. Globe 474	15, 23, 24, 35
71 Cong. Globe 475	23
71 Cong. Globe 504	25
71 Cong. Globe 522	35
71 Cong. Globe 523	25
71 Cong. Globe 527	35
71 Cong. Globe 569	35
71 Cong. Globe 599	18, 19
71 Cong. Globe 600	26
71 Cong. Globe 601	26, 27, 30
71 Cong. Globe 602	27, 28
71 Cong. Globe 603	28
71 Cong. Globe 604	28
71 Cong. Globe 605	29
71 Cong. Globe 1115	17
71 Cong. Globe 1118	30, 31
71 Cong. Globe 1143	17
71 Cong. Globe 1292	31
71 Cong. Globe 1679-1680	20
71 Cong. Globe 1758	21, 31
71 Cong. Globe 1760	21, 31, 32
71 Cong. Globe 1777	34

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QUESTIONS PRESENTED

1. Whether an employer's dismissal of two white employees for serious theft of company property on the job without dismissing a similiarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1964 against their union for acquiescing therein.

2. Whether two white employees who were dismissed for theft of company property on the job have standing to sue under 42 U.S.C. §1981 because they were not accorded the same rights as a black employee who was similarly charged but not dismissed.

STATEMENT OF THE CASE

The District Court dismissed this case after more than two and one-half years of pretrial activity, including motions to dismiss, pretrial conferences, and discovery proceedings. During this period, the District Court filed three memorandum opinions, on January 4, 1974, May 2, 1974, and June 13, 1974, in which it interpreted Petitioners' pleadings and contentions to be that Petitioners were "equally guilty" of theft of the employer's property in comparison with a Negro employee who was not discharged (Appendix to Petition, p. 36) and that

> "[t]he pleadings of plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged". Appendix to Petition, pp. 33 and 28.

The district Court was also advised by the parties that Petitioner McDonald's discharge was taken to arbitration by the Union where the discharge was upheld, although the Court properly declined to accord finality to the arbitration award for Title VII purposes. (Appendix to Petition, pp. 27 and 32; see also Petitioners' Brief in the Court of Appeals, p. 4)[1]

The posture of the case below does not, in this Respondent's view, accommodate the claim of Petitioners that they were not afforded an opportunity by the District

1. Petitioners' Brief in the Court of Appeals states at page 4: "On October 2, 1970, L. N. McDonald filed a grievance with Local Union No. 988, and a hearing on the grievance was held before the Southern Area Multi-State Grievance Committee commencing at 9:00 A.M., Monday, October 10, 1970, at the Ramada Inn, West Beach, Biloxi, Mississippi, Case No. 58."

Court to offer evidence that they were innocent of the acusations. Petitioners did not by requesting leave to sharpen their pleadings or by any other means advise the District Court or the Court of Appeals that the gravamen of their claim was innocence or that the District Court misunderstood their posture.

In the view of this Respondent, therefore, this appeal comes to the Supreme Court as a case involving a claim by two white persons that they and a Negro employee were "charged" with theft of the employer's property, that all three were guilty, but the employer imposed disparate discipline against the two white employees in comparison to the Negro employee involved in the affair.[2]

Theft of company property of over $200 is a felony under the Texas Penal Code.[3]

As to this Union Respondent, the allegation was that it "acquiesced" in the "more severe disciplinary action against [plaintiffs] because of their race, Caucasian, than against their negro counterpart." App. 38-39; 40.

District Court Rulings

In the Court's Memorandum Opinion of January 4, 1974 the Court said:

2. The theft charge involved 10 cases of anti-freeze which Petitioner McDonald was accused of stealing from trailer 20438. McDonald stated in his grievance that a shipping clerk at "S.M.S." told him to do what he like with "some anti-freeze over on trailer 20438," that he so informed Petitioner Laird, "my supervisor," and that Laird told him "what to do with this anti-freeze." See Appendix to Petition, pp. 50-51.

3. Texas Penal Code Article 31.03, Vernon's Texas Codes Annoted-Penal, provides that theft of property valued at $200 or more is "a felony of the third degree" which is punishable by confinement in the State penitentiary for not less than 2 nor more than 10 years under Article 12.34 of the Penal Code.

"This Court is also concerned with whether the complaint states a claim upon which relief can be granted. Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 688, 93 S.Ct. 1817 (1973). Assuming, arguendo, that the plaintiffs were discharged because they were white while an equally guilty Negro employee was retained because of his race, this Court still questions whether the plaintiffs have stated a claim. (This Court assumes for present purposes that the Negro employee had a similar work record and similar degree of culpability in the offense.) This point has received inadequate attention in the pleadings filed by the parties and has not been briefed. App. 94

Later, in the Memorandum Opinions of May 2, 1974 and June 13, 1974 the Court said:

"Finally, the Court has reconsidered its Memorandum and Opinion of January 4, 1974, wherein it stated:

'Assuming, but not deciding that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 688, 678, 93 S.Ct. 1817 (1973).'

"The pleadings of the plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly

charged Negro employee was not discharged. Upon reconsideration, the Court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted. For these reasons,

"IT IS THE OPINION OF THIS COURT that this cause of action should be and hereby is dismissed with prejudice." App. 107; App. 117

The District Court properly dismissed Petitioner Laird's Title VII action against the union because Laird filed no charges against the union before the E.E.O.C. App. 114-115. (Laird was a foreman not covered by the labor contract.)

Court of Appeals Rulings

The Court of Appeals affirmed in these words:

"[2] We likewise agree with the district court's conclusion that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C.A. §2000e et seq. There is no allegation that the plaintiffs were falsely charged. Disciplinary action for offenses not constituting crimes is not involved in this case. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Cf. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939); *Nix v. NLRB*, 418 F.2d 1001, 1006 (5th Cir. 1969); *AHI Machine Tool & Die, Inc. v. NLRB*, 432 F.2d 190 (6th Cir. 1970). App. 121-122

SUMMARY OF ARGUMENT

1. The courts below properly construed *McDonald Douglas Corp. v. Green*, 411 U.S. 792, to be inapplicable to punishment for a serious theft of substantial company property on the job. As a matter of public policy as well as common sense it should not be concluded absent clear evidence that Congress intended to grant to an employee who is established to be guilty of such serious theft the right to demand of a union or a company that the punishment be so administered that the employer must discharge no one or every one involved in the theft episode. Such a rule would not advance the purposes of Title VII and would be counterproductive.

2. As to the claim under 42 U.S.C. § 1981 the statute does not apply to a claim by a white person that he be treated equally with a black person. Contrary to the analysis of the legislative history of the Civil Rights Act of 1866 submitted by Petitioners and their supporting amici curiae, the legislative history shows that Congress intended to legislate in favor of freedmen, and in the process for other non-whites, to secure to them certain rights to whatever extent those rights were "enjoyed by white citizens." There is no constitutional problem. It was not incumbent upon Congress to legislate on behalf of white persons in the process of implementing the Thirteenth Amendment. A remedial statute may aim at the evil to be corrected.

ARGUMENT

I.

AN EMPLOYEE WHO IS GUILTY OF SERIOUS THEFT OF COMPANY PROPERTY ON THE JOB DOES NOT PRESENT A CLAIM UNDER TITLE VII BY OBJECTING TO HIS DISCHARGE ON THE GROUND THAT ANOTHER EMPLOYEE OF ANOTHER RACE WHO WAS EQUALLY CULPABLE WAS NOT DISCHARGED.

There is no doubt that white employees under Title VII have rights identical to those of black employees to be free of discrimination. The statute is couched in terms of hiring, discharging, or otherwise discriminating against any individual because of his race. No one contended otherwise and neither court below was confused on this point. Nevertheless, it is entirely appropriate for this Court to articulate the identical right of access to the statute which is available to white citizens. Union Respondent is in accord with the discussion of this subject in Petitioners' Brief pp. 8-16.

Respondent Union requests affirmance of the judgment under Title VII on the limited grounds stated below. This limited position relates to the claimed right of an employee who is guilty of serious theft of company property on the job to receive only that punishment which is equal to that of an employee of another race. More specifically, this respondent requests affirmance on the ground that a union's duty under Title VII does not obligate it to achieve or demand that an employer either discharge no employee or discharge all employees similarly situated.

The District Judge, Carl O. Bue, Jr., one of the best in the country, dismissed this case without motion or pleading by either defendant related to this point. We suggest that the District Court's reaction to the case was entirely appropriate.

Respondent suggests that serious crime in the form of substantial theft is an unworthy predicate for compulsory egalitarian punishment under Title VII.

A union is not in position to insist that an employer retain in its employ every person found to be guilty of serious theft especially in the transportation industry where employees must be entrusted with possession of or access to goods in transit. (Theft of interstate shipments by common carrier are punishable by fine up to $5,000 or imprisonment up to 10 years if the value of the goods exceeds $100. 18 U.S.C. §659). Rather, a union's principal legitimate function is to establish innocence or lack of proof or to seek mitigation of punishment. But, also, a union is not in the business of causing employees to be fired. If in this and similar cases a union is given the duty to demand that the employer discharge all or none in obedience to Title VII the inevitable result will be to cause the employer to discharge everyone arguably in similar circumstances in order to avoid the burden of Title VII litigation or financial exposure under it.

The purpose of Title VII is "to assure equality of job opportunities and to eliminate those practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens". *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). But discipline for established serious theft of an employer's property is not a proper occasion for the offending em-

ployee to demand absolute equality in punishment. For public policy reasons, equal punishment for serious theft on the job should not be held a requirement of Title VII unless the improbable is positively clear, namely, that Congress intended to confer equal rights upon all races to participate in stealing. Selective punishment of an employee for a particular offense of serious theft is not really an "artificial, arbitrary or unreasonable barrier to employment" at least if no pattern of employer discrimination is present.

Title VII like any other statute should be applied with due regard to other public policy. Thus, the statutory right under §704(a) of Title VII to be free of reprisal for efforts to oppose unlawful discrimination must yield to the orderly bargaining processes of the National Labor Relations Act. *Emporium Capwell v. Western Addition Community Organization; NLRB v. Western Addition Community Organization*, 95 S.Ct. 977 (1975).

In other areas: the normal right to strike under the National Labor Relations Act must yield in the case of seamen aboard ship to the law of mutiny. *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942). The normal operation of the preemption doctrine under the National Labor Relations Act must yield, for policy reasons, to the rights of states to prevent or redress violence or breaches of the peace. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247-48 (1959).

Undoubtedly, *McDonnel Douglas Corp. v. Green, supra*, establishes that even unlawful conduct such as a "stall in" —a misdemeanor—may not be used by an employer as a discriminatory pretext to refuse rehire to a minority employee, but a main thrust of the case was to make clear

that such unlawful activity against an employer is adequate basis for refusal to rehire:

> "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate unlawful activity against it." 401 U.S. at 803

The present case is a long step further removed from Title VII because an employee's crime of serious theft against an employer is totally indefensible and inconsistent with continuation of employment absent employer consent. The "stall-in" in *McDonnell,* while illegal, did not directly relate to fitness for employment and was an excess in, but closely related to, protected protest activity. There is a marked difference in the ethics and morality of the "stall in" there compared to the serious theft on the job here. *McDonnell* is primarily an exposition of the order and allocation of proof in a private, non-class action case. The opinion specifies in footnote 13 that its specifications are not necessarily applicable in every respect to differing factual situations.

The portion of the opinion which seems to the Respondent to be inapplicable to this case is the following:

> "Petitioner may justifiably refuse to rehire one who has engaged in unlawful disruptive acts, but only if this criterion is applied alike to members of all races." 411 U.S. 804

If this passage applies to a single case of serious theft so that an employer must discharge either no one or everyone involved, it imposes a burden on the employer which is irrelevant to Title VII as well as an irrational duty upon the union. The union, instead of directing

its efforts to do the best it properly can do for all employees is put to it to risk of forcing the employer to refuse leniency for anyone. As in this case, the result would truly turn the blade backward. It bears repeating that employers would be induced to apply maximum punishment to everyone arguably involved in an episode of theft in order to reach some employee who, it feels, must be given maximum punishment.

Evidently, the Court of Appeals felt that *NLRB v. Fansteel Metallurigcal Corp.,* 306 U.S. 240 (1939) which was seemingly followed by the Court in *McDonnell, supra,* pointed in a different direction involving as it did serious misconduct facts. In *Fansteel,* some, but not all, of the sit-down strikers were discharged while the others were taken back into employment. 306 U.S. at 249. The Court set aside an NLRB order directing reinstatement of the discharged sit-down strikers, saying:

> "The important point is that respondent stood absolved by the conduct of those engaged in the 'sit-down' from any duty to reemploy them, but respondent was nevertheless free to consider the exigencies of its business and to offer reemployment if it chose. In so doing it was simply exercising its normal right to select its employees." 306 U.S. 259

The NLRB in *Fansteel* had ruled that the employer's argument that sit-down strikers could not be reinstated by the Board was undermined by the fact of the employer's acceptance of many sit-down strikers for return to work:

> "Furthermore, in view of the fact that the respondent did take back a large number of the sit-down strikers,

> we find it difficult to believe that respondent's objection on that score is put forward in good faith." 5 N.L.R.B. 930, 2 L.R.R.M. 85, 91.

In conclusion, Respondent union presents a very limited contention in support of the judgment below. It is limited to the isolated case of serious theft of company property on the job, a situation which fortunately does not arise with sufficient frequency to disturb seriously the operation of Title VII. The main concern of Respondent is the exposure to litigation or liability which it may encounter under Title VII when it fails to achieve absolute equality of treatment in this type of case. It is commonplace for uions to compromise or abandon grievances of this particular kind on terms which may differ for various employees. This is true especially where it is obvious that an arbitrator will have very little appetite to reinstate perpetrators of serious theft of company property on the job. If a union can settle such a hard case on terms less than discharge should it be liable because it "acquiesced" in another employee's discharge? The quoted passage from *McDonnell,* supra, unfortunately suggests an affirmative answer. For this reason we submit that the passage is not applicable to this case.

ARGUMENT

II.

42 U.S.C. § 1981 DOES NOT AFFORD TO WHITE PERSONS A CAUSE OF ACTION FOR ALLEGED FAILURE TO ACCORD EQUALITY WITH BLACK PERSONS.

Petitioners and their supporting amici curiae have invited the Court to perform plastic surgery upon the statute.

Frankly, this Respondent and its undersigned counsel have no serious objections. Nevertheless, in the discharge of our duty to the Court we have reviewed the legislative history of the Civil Rights Act of 1866, predecessor of §1981, and have collated relevant items of legislative history which we believe satisfactorily explain the matters relied upon by all adverse parties and which overcome their effect. We submit these for the consideration of the Supreme Court as a part of our professional responsibility to present concrete adversary considerations. We have also come to the firm conclusion that the items presented in support of Petitioner's position do not justify the emasculation of the statute which is requested.

The legislative history of the 1866 Act demonstrates, we believe, that the Reconstruction Congress of 1866 intended to achieve equality for freedmen by securing to them the same rights as are enjoyed by white citizens and by protecting them against pains, penalties or punishments greater than those prescribed for the punishment of white citizens. In the process Congress also provided parity of other non-white citizens with white citizens. The standard against which the rights of non-whites were to be measured was the rights of white citizens. The net result was equality for all, as Congress desired.

The few statements by speakers referred to by Petitioners and their supporters to the effect that the bill provided for the equal rights of all citizens are consistent with the above analysis. On inspection, they are found to be the products of a syllogism that ran like this: The bill makes citizens of freedmen and others who are not citizens; the bill provides that the new citizens will have the same rights and immunities as are enjoyed by whites and provides legal sanctions to protect freedmen in these newly

bestowed rights; *therefore,* the bill provides equality of rights for all citizens. The syllogism is sound but it is also consistent with all the words of the Act as finally passed and with Respondent's view that the Act confers actionable rights only upon non-whites and not upon whites.

First, it should be noted that there is no constitutional problem. The Thirteenth Amendment, in Section 1, pro vides that neither slavery nor involuntary servitute shall exist within this nation. Section 2 provides:

> "Congress shall have power to enforce this article by appropriate legislation."

In the *Civil Rights Cases,* 109 U.S. 3, majority and minority opinions agreed that Section 2 clothed Congress with the power to pass all laws necessary and proper for abolishing "all badges and incidents" of slavery and to eradicate "the last vestiges . . . of a society half slave and half free." *Jones v. Alfred H. Mayer,* 392 U.S. 409, 439, 441 (1968).

It was not incumbent upon Congress to legislate on be half of the dominant white majority as a condition of addresing itself to the vestigial legal and social "burdens and disabilities" of slavery which persisted. The Thirteenth Amendment had converted the slaves into freedmen, but freedmen had been denied the practical ralization of freedom and their legal position had been rendered ambiguous by the recalcitrance of the white majority in the South. It was within the power of Congress to select the specific means of relieving the freedmen of the burdens, disabilities and vestiges of slavery and to assist them to attain and retain equality with other Americans. *Id.* 392 U.S. at 440, 443-44.

Remedies which utilize racial classification for the cure of *de jure* discrimination are appropriate if they are rationally related to the evils to be corrected. *Swann v. Charlotte-Mecklenberg Bd. of Educ.,* 402 U.S. 1, 19-20 (1971); *Louisiana v. United States,* 380 U.S. 145 (1965).

At least so long as the adopted solution resulted in equality for whites and non-whites it was not constitutionally infirm or suspect because it did not also also provide a converse cause of action for white citizens.

Section 1 of Senate Bill 61, as introduced was as follows:

> "There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary ser vitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." 71 Cong. Globe 474; see also id. at 211.

The original Section 1 did not contain what later became its first clause which declared citizenship in all native born Americans. It also did not contain the "same right" for every inhabitant *"as is enjoyed by white citizens."* However, Section 2, introduced at the same time

did establish the standard of white citizens' rights. It provided:

> "Any person who under cover of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected any inhabitant of any State or Territory to the deprivation of any right secured or protected by the Act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitute, except as a punishment from crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, is to be deemed guilty of a misdemeanor, and on conviction to be punished by a fine not exceeding $1,000, or imprisonment not exceeding one year, or both, in the discretion of the court. (71 Cong. Globe 211)

It is to be noted that Section 2, inartfully drawn, provided criminal penalty for the deprivation of any right secured or protected by the act by any person under color of law, etc., *"on account of* [*the victim's*] *having at any time been held in condition of slavery or involuntary servitude"* or "by reason of his color or race." It also punished criminally the imposition of different punishment, pain or penalty "*than is prescribed for white persons.*" From the very be ginning, therefore, the bill established a standard equal to the legal privileges of white persons at least in some measure. An incongruity was present, however, that Section 2 seemed not to adopt the standard of white citizens' rights in its first phase (*i.e.*, interference with the bestowed af firmative rights of all inhabitants) but it did do so in regulating punishments, pains and penalties. This disparity was corrected in the House which inserted in Section 1

the phrase "as is enjoyed by white citizens." 71 Cong. Globe 1115. This particular change was accepted by the Senate without discussion beyond the exchange between Senators Van Winkle and Trumbull in which the latter stated that the House thought the change was of some importance and that in the opinion of the Senate Judiciary Committee the change did not alter the meaning of the bill. (71 Cong. Globe 1143) But the change did serve to eliminate the incongruity between Sections 1 and 2. As changed, both sections adopted the standard of the legal rights and privileges of white citizens in bestowing and protecting affirmative rights upon all citizens and likewise in regulating the punishments, pains and penalties which may be imposed. In this respect, Sections 1 and 2 were made symmetrical.

All of the amici curiae as well as Petitioners attach critical importance to the cited, rather casual exchange between Senators Van Winkle and Trumbull as a means of obliterating from the statute the vital phrase "as is enjoyed by white citizens" but the colloque is more reasonably interpreted the other way. The House did attach "some importance" to its inserted language according to Senator Trumbull and Sections 1 and 2 were synchronized thereby. Since the standard of white citizens' rights and privileges had been a part of the Senate's Section 2 from the beginning, the statement that the phrase did not alter the meaning of the bill can be just as reasonably interpreted to mean that the standard had been understood all along. We will show that several members of Congress did so understand it.

Likewise, a fragile reed are the remarks of Senator Trumbull on February 2, 1866, the date of first passage

in the Senate (71 Cong. Globe 599), to the effect that the bill applies to and protects white men as well as black men and is not for the benefits of black men exclusively. Here again all briefs supporting Petitioners' position rely heavily upon this item.

We find, however, that these remarks were a part of extemporaneous, impassioned rebuttal at the 11th hour provoked by an equally histrionic performance by Senator Davis in the last hours of debate. Senator Davis had said in part:

> "Yes, sir, here is a law almost eo nomine, made unquestionably for the benefit of the free negro and in violation of the Constitution, and the marshals are required, under the penalty of $1,000 for every instance of defalcation, to execute the process under this void and unconstitutional law, and if they fail to do so the commissioner is authorized by this monstrous and abominable bill to summon every bystander to aid the marshal in the execution of this unconstitutional law, to summon the posse comitatus of the county in which the process is to be executed to aid in it, and, if necessary, to summon the entire Army and Navy of the United States to execute such void process.
>
> "When, sir, was such partiality ever shown for the white man, the sovereign, citizen, and lord of this land—him who made the Government, who won its independence, who established, as he thought, the deep and firm foundations of a free Government in a written Constitution, and whose mission it is to uphold and to defend that Government for himself and for his latest posterity? When was such partial, unjust, and iniquitous legislation devised for the white man who achieved all this good for his country and for the world? Never, never. But the negro and his insane friends bring up now for the first time such monstrous legislation." (71 Cong. Globe 599)

Beyond doubt both gentlemen were agitated and plunged into exaggeration in discharging these oratorical fireworks at the hour of final passage by the Senate on February 2, 1866. But earlier, in formal presentations Senator Trumbull and others, proponents and opponents, had stated and repeated the theme many times that the bill achieved equality by elevating freedmen to the position of white citizens. So far as we can determine, no one said or implied that the bill conferred rights of action upon white citizens.

Indeed, these oratorical fireworks, discharged *before* the House injected the phrase "as is enjoyed by white citizens" should be compared to Senator Trumbull's subsequent formal reply to President Johnson's veto message.

President Johnson's veto message was unambiguous in attributing to both Section 1 and Section 2 the creation of rights for new citizens, not white citizens, and the provision of special protection for the former, not the latter:

> "The first section of the bill also contains an enumeration of the rights to be enjoyed by these classes, so made citizens, 'in every State and Territory in the United States.' These rights are, 'To make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property,' and to have 'full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.' So, too, they are made subject to the same punishment, pains, and penalties in common

with white citizens, and to none others. Thus a perfect equality of the white and black races is attempted to be fixed by Federal law, in every State of the Union, over the vast field of State jurisdiction covered by these enumerated rights. In no one of these can any State ever exercise any power of discrimination between the different races.

* * * *

"The object of the second section of the bill is to afford discriminating protection to colored persons in the full enjoyment of all the rights secured to them by the preceding section." (71 Cong. Globe 1679-1680).

President Johnson objected that the bill enumerated the rights of "these classes—so made citizens" to be the same as those "enjoyed by white citizens," thus attempting to fix "perfect equality" by federal law. As to Section 2, he complained of the discriminating protection to colored persons." In reply, Senator Trumbull demurred. He discussed Section 2 thus:

"Can human ingenuity point out wherein that section discriminates in favor of colored persons? It says, in effect, that no one shall subject a colored person to a different punishment than that inflicted on a white person for the same offense. Does that discriminate in favor of the colored person? Why, sir, the very object and effect of the section is to prevent discrimination, and language, it seems to me, could not more plainly express that object and effect. It may be said that it is for the benefit of the black man because he is now in some instances discriminated against by State laws; but that is the case with all remedial statutes. They are for the relief of the persons who need the relief, not for the relief of those who have the right already; and when those

needing the relief obtain it, they stand upon the precise footing of those who do not need the benefit of the law." (71 Cong. Globe 1758).

Further in reply, Senator Trumbull relied upon the phrase "as is enjoyed by white persons":

" 'The details of the bill,' says the President, 'establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race.'

"With what truth this can be said of a bill which declares that the civil rights and the punishment of all races, including, of course, the colored, shall be the same as those 'of white persons,' let an intelligent public judge." (71 Cong. Globe 1760).

Respondent suggests that these formal pronouncements of Senator Trumbull after the bill was in final form are more reliable than the extemporaneous item relied upon by Petitioners and their supporters.

The bill also authorized the President of the United States to employ the army or navy to prevent violations.

"And the President of the United States, or such person as he may empower for that purpose, is to have authority to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary, to prevent the violation and enforce the due execution of the act." (71 Cong. Globe 212)

Senator Trumbull explained these extraordinary provisions as necessary to the effectuation of Section 1, but as we know, Section 2 and the other provisions related expressly

or impliedly only to oppression of freedmen by white persons.

Returning to the original form of the bill, we point out that the bill as introduced also provided a right of removal to federal court for any person or officer sued or prosecuted in state court on account of acts committed under its authority. (71 Cong. Globe 211):

> "and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any such person, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed, by virtue or under color of authority derived from this act, or the act to 'enlarge the powers of the Freedmen's Bureau, such defendant is to have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March 3, 1863." (71 Cong. Globe 211)

Senator Trumbull's opening and formal remarks on January 29th, immediately after presenting the amendmen to declare native born persons of African descent to b "citizens of the United States," stated the purpose of t bill:

> "When the constitutional amendment was adopted and slavery abolished, all these statutes became null and void, because they were all passed in aid of slavery, for the purpose of maintaining and supporting it. Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them

> to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment. (71 Cong. Globe 474)

Thus, the purpose of the bill was to protect freedmen from the oppressions of their white oppressors.

Section 2 was described by Senator Trumbull as a protection for freedmen only:

> "This is the valuable section of the bill so far as protecting the rights of *freedmen* is concerned. That they are entitled to be free we know. Being entitled to be free under the Constitution, that we have a right to enact such legislation as will make them free, we believe; and that can only be done by punishing those who undertake to deny them their freedom. When it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease." (71 Cong. Globe 475). (Emphasis added).

The last sentence of this passage speaks generally of equality for "any person" but the context as well as the wording of Section 2 as passed confines the sanctions of Section 2 to those who deprive *freedmen* of their rights under the bill.

After reading Section 1, Senator Trumbull declared the following relationship between it and the other sections:

> "This section is the basis of the whole bill. The other provisions of the bill contain the necessary machinery to give effect to what are declared to be the rights of all persons in the first section, and the question will arise, has Congress authority to pass such a bill? Has Congress authority to give practical effect to the great declaration that slavery shall not exist in the United States? If it has not, then nothing has been accomplished by the adoption of the constitutional amendment. In my judgment, Congress has this authority." (71 Cong. Globe 474).

The "other provisions of the bill" were designed to punish or overcome white persons' opposition to the implementation of freedmen's equal rights established by the bill. There was no provision in the Act as passed for any vindication of the rights of white persons in relation to those of other persons.

Senator Howard spelled out the proponents' logic that the Thirteenth Amendment made Negroes free and thus entitled them to the rights and the attributes of freedom according to universal understanding of the American people. The bill, he said, was designed to secure to the freedmen the ordinary rights of other freemen, thus:

> "The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?
>
> "Mr. President, I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights—and those are some of the civil rights which I have just enumerated —there is to be hereafter no distinction between the white race and the black race. It is to secure to these

> men whom we have made free the ordinary rights of a freeman and nothing else." (71 Cong. Globe 504).

This discussion by Senator Howard repeats the syllogism.

Senator Davis, a principal opponent, summarized Sections 1and 2 of the bill thus:

> "The amendment now before the Senate proposes to declare all the negroes in the United States citizens of the United States. The honorable Senator from Illinois plays for three pockets in this bill. The first is, the bill itself, and the first and second sections, essentially, upon which he relies to confer upon the free negroes all the civil rights that under our Government appertain and belong to white citizens." (71 Cong. Globe 523)

No one disputed Davis' statement that that bill merely conferred upon Negroes the rights that "appertain and be long to white citizens" or claimed that it also conferred upon white persons the rights which belonged to blacks.

Senator Guthrie, an opponent, stated that the Thirteenth Amendment had already put Africans on the same footing as whites in relation to civil rights and he argued that the bill did do, and could do, no more:

> "My doctrine is that slavery exists no longer in this country; that it is impossible to exist in the face of that provision; and with slavery fell the laws of all the States providing for slavery—every one of them. I do not see what benefit can arise from repealing them by this bill, because if they are not repealed by the Constitution as amended, this bill could not repeal them. I hope that all the States in which slavery formerly existed will accept that constitu-

> tional provision in good faith. I myself accept it in good faith. Believing that all the laws authorizing slavery have fallen, I have advised the people of Kentucky, and I would advise all the States, to put these Africans upon the same footing that the whites are in relation to civil rights. They have all the rights that were formerly accorded to the free colored population in all the States just as fully this day as they will have after this bill has passed, and they will continue to have them." (71 Cong. Globe 600).

No one would argue that the Thirteenth Amendment conferred rights upon whites.

Senator Guthrie thus interpreted the bill's coverage:

> "Now what is the result of this bill? It enforces through its own officers and through its own agents a prosecution of the citizens who infract it, or commit what they suppose is an infraction of it, in favor of the black population and in favor of the black population only; taking it for granted throughout that the wrong is on the side of the white man alone; making no provision for prosecuting a black man for any crime that he may commit against a white man.
>
> * * *
>
> "The time will not always be that the citizens will be content that the State governments should be interfered with, and that there should be in each State two sets of police officers, one to punish those who commit what they presume to be offenses against the Africans, and another to punish the African for his crimes under the State laws, and that punishment should be made the pretense of prosecuting the white man in your courts. The thing will not work; it ought not to work; and it never should have been introduced here. It is not necessary to secure the freedom of the African." (71 Cong. Globe 601).

The President's authority to utilize the armed forces to prevent violations of the bill was understood thus by Senator Hendricks:

> "The denial of equality to the colored people. Some man disputes the proposition; some judge proposes in his adjudication not to recognize the civil equality of the colored people. Now the military may be called in to prevent the violation of this law." (71 Cong. Globe 601-602).

Senator Lane of Indiana, a proponent of the bill, answered Senator Guthrie with the argument that the admittedly special enumeration and protection of freedmen were necessary because of their special needs:

> "What are the objects sought to be accomplished by this bill? That these freedmen shall be secured in the possession of all the rights, privileges, and immunities of freemen; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment. How else, I ask you, can we give them effect than by doing away with the slave codes of the respective States where slavery was lately tolerated? One of the distinguished Senators from Kentucky [Mr. Guthrie] says that all these slave laws have fallen with the emancipation of the slave. That, I doubt not, is true, and by a court honestly constituted of able and upright lawyers, that exposition of the constitutional amendment would obtain.
>
> "But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give the courts of the United

States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts? That is the necessity for this provision." (71 Cong. Globe 602)

* * *

"I think, then, that the provisions of this bill admirably calculated to secure to these colored persons their rights under the constitutional amendment, and I think the provision contained in the last section of the bill more important than any other." (71 Cong. Globe 603)

Senator Wilson, a proponent of the bill, stated its purpose to be the security of "new born rights" of freedmen:

"By the will of the nation freedom and free institutions for all chains and fetters for none, are forever incorporated in the fundamental law of regenerated and united America. Slave codes and auction blocks, chains and fetters and bloodhounds are things of the past, and the chattel stands forth a man with the rights and powers of the freemen. For the better security of these newborn civil rights we are now about to pass the greatest and the grandest act in this series of acts that have enancipated a race and disenthralled a nation." (71 Cong. Globe 603).

Senator Cowan, an opponent, interpreted the bill thus:

"here is an act of Congress which declares that, as to all civil rights and immunities, the negro is to be put upon precisely the same footing as the white man." (71 Cong. Globe 604).

In further reply to Senator Guthrie, Senator Trumbull explained that Section 1 of the bill provided no more than the same rights to the black population which were enjoyed

by the white population and Section 2 would secure Negroes in their rights:

"He says that when slavery was abolished the slave codes in connection with it were abolished, and that he will advise the people of Kentucky to extend the same civil rights to the black population that the white population have. He believes that they are entitled to them. Now, sir, that is all that is provided for by the first section of this bill; he then can have no objection to the first section of the bill, for it simply provides that all the inhabitants of the United States shall be entitled to the same civil rights."

* * * *

"The second section of this bill merely punishes persons who violate what it is admitted they ought not to violate. It does seem to me that there can be no objection to the passage of such a law by Congress on the part of any one who admits that negroes are now entitled to the same rights as white people; and not only that there can be no objection to it but that there is a positive duty upon us to pass such a law if we find discrimination still adhered to in the States where slavery has recently existed." (71 Cong. Globe 605).

Senator Hendricks interpreted the thrust of Section 1 and 2 to be recognition of the rights of blacks to be equal to those of whites:

"This bill is a wasp; its sting is in its tail. Sir, what is the bill? It provides, in the first place, that the civil rights of all men, without regard to color, shall be equal; and, in the second place, that if any man shall violate that principle by his conduct, he may be responsible to the court; that he may be prosecuted criminally and punished for the crime, or be sued in

> a civil action and damages recovered by the party wronged. Is not that broad enough? Do Senators want to go further than this? To recognize the civil rights of the colored people as equal to the civil rights of the white people, I understand to be as far as Senators desire to go; in the language of the Senator from Massachusetts [Mr. Sumner] to place all men upon an equality before the law; and that is proposed in regard to their civil rights." (71 Cong. Globe 601).

All briefs on Petitioners' side rely heavily on Congressman Wilson's statement to the House (71 Cong. Globe 1118) that the government must protect citizens "from the highest to the lowest, from the whitest to the blackest. . . ." The next following comments of Mr. Wilson, however, made clear that the provisions of the bill were intended to deal to the oppression of blacks by whites:

> "It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on 'account of race, color, or previous condition of slavery.' That these things should not be is no answer to the fact of their existence. That the result of the recent war, and the enactment of the measures to which the events of the war naturally led us, have intensified the hate of the controlling class in the insurgent States toward our colored citizens is a fact against which we can neither shut our ears nor close our eyes. Laws barbaric and treatment inhuman are the rewards meted out by our white enemies to our colored friends. We should put a stop to this at once and forever. And yet I would not do this in a way which would deprive a white man of a single right to which he is entitled. I would merely enforce justice for all men; and this is lawful, it is right, and it is our bounden duty.

> "In order to accomplish this end it is necessary to fortify the declaratory portions of this bill with such sanctions as will render it effective. The first of these is found in the second section, ..." (71 Cong. Globe 1118)

Congressman Shellabarger after reading to the House Section 1 as amended by the insertion of the phrase "as is enjoyed by white citizens" explained:

> "But, sir, on yesterday, the honorable gentleman from Pennsylvania [Mr. Broomall]—than whom there is no more candid or just gentleman in the House—treated this measure as though it was a bill simply for the protection of freedmen in their rights for the time being in the late insurrectionary States. That is a great mistake. It applies to every State in the Union, to States which have never been in insurrection, and is to be enforced in every State of the Union, not only for the present but for all future time, or until it shall be repealed by some subsequent act of Congress. It does not expire by virtue of its own limitation; it is intended to be permanent." (71 Cong. Globe 1292).

Thus, the bill was for the protection of *freedmen* and was to be permanent.

Reference has been made at pages 20-21, supra, to the post-veto formal rebuttal by Senator Trumbull to the president's veto message (71 Cong. Globe 1758; 1760). There Senator Trumbull admitted that Section 2 was for the benefit of black persons only and retorted: "That is the case with all remedial statutes. They are for the relief of persons who need the relief, not for the relief of those who have the right already." And further he said "With what truth can this be said (i.e. that the bill provided

for the security of the colored race more than was ever provided for the white) of a bill which declares that the rights and punishment of all races, including, of course, the colored shall be the same as those 'of white persons' let an intelligent public judge." Id. 1760.

In the same post-veto discussion Senator Trumbull was not alone in making analysis to this effect. Senator Davis, in opposition, stated without denial from any one as to the effect of the bill, the following:

> "If I, after the best examination which I can give to this act, was asked for an appropriate title, I would propose to the Senator from Illinois, 'An act to abolish and modify all laws, statutes, ordinances, regulations, and customs throughout the United States, so far as they make any discriminations for the white against the black or colored population thereof; to punish by fine and imprisonment all persons who may enforce such discriminations; and requiring certain officers to institute criminal and civil proceedings against them, at the cost of the United States.'" (71 Cong. Globe 182)
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> * * * *
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> "In the simulation of imperial will and power in relation to all those most interesting concerns, appertaining to every human being in America, it declares there shall be no discrimination as to persons on account of race, color, or previous condition of slavery. This general and sweeping language is used for a purpose; it is a sort of mask to cover partially the true beneficiaries and objects of the measure, the negro race and their aggrandizement." (Ibid)
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> * * * *
>
> "I wonder if the legislators who might pass such laws would not cause the negroes, who would be

> by them deprived of civil rights assured to white persons, or have different punishments inflicted upon them from white people who had committed the same offenses, would not have caused those discriminations against negroes; and would not, therefore, come within the purview of the penal section of this bill. The Senator's triumph over the President is but his own self-delusion.
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> * * * *
>
> "But this measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation, or custom,' as well as by 'law or statute.'" (71 Cong. Globe 183)
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> * * * *
>
> "But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars are assigned to white persons to the exclusion of negroes and mullatoes. All these discriminations in the entire society of the United States are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them all away, and to consummate their destruction, and bring the two races upon the same great plane of perfect equality, declares all persons who enforce those distinctions to be criminals against the United States, and subjects them to punishment by fine and imprisonment,

and directs the appointment of legions of officers to prosecute, both penally and civilly, for the benefit of the favored negro race, at the cost of the United States, and puts at the disposal of these officers the posse comitatus, the militia, and the Army and Navy of the United States, to enable them to execute this bold and iniquitous device to revolutionalize the Government and to humiliate and degrade the white population, and especially of the late slave States, to the level of the negro race." (Ibid).

To the same effect were the never denied comments of Senator Johnson in opposition:

> "This first section has another provision. Not satisfied with making the parties citizens and clothing them with all the rights belonging to white citizens by the laws of the States, it says that they 'shall be subject to like punishment, pains, and penalties, and to none other." (71 Cong. Globe 1777).

Another line of discussion that ran through the debate concerned the first sentence of Section 1 of the bill which, in its final form, vested citizenship in all persons born in the United States "not subject to any foreign power, including Indians not taxes." The original form of this first sentence was quite different.

On January 29, 1866, before debate started, Senator Trumbull presented an amendment which ultimately evolved into the first sentence of Section 1. The original form of the proposal was:

> "That all persons of African descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery, etc." (71 Cong. Globe 474)

Senator Trumbull's first proposal was aimed directly to benefit only persons of African descent and discloses further the legislative intention behind Section 1 of the bill as well as its other provisions.

Until the passage of the Civil Rights Act of 1866 only the children of white persons became citizens by virtue of birth in the United States. *U. S. v. Wong Kim Ark*, 169 U.S. 649 (1898). Of course, citizenship of Negroes was not possible under the *Dred Scott* decision, 19 How. 393 (1857), as well as other provisions of the original Constitution such as that which counted the Negro population on a three-fifths fractional basis.

The status of other persons of color such as Indians and Chinese was the subject of dispute but, no doubt, the prevalent opinion held that only white children born in the United States were citizens thereof.

Senator Trumbull's proposal for a new first sentence went through several proposed changes to deal with Indians. (71 Cong. Globe 522, 527 and 569) The final form of the first sentence was:

> "Sec. 1. That all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color shall have the same right . . . as enjoyed by white citizens . . ., etc."

In subject re-enactments of the statute, the first sentence was supplanted by the Fourteenth Amendment which in Section 1 reads as follows:

"Section 1. All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside . . . ."

The legislative discussion leading to the passage of the 1866 Act reveals a common opinion of the members of Congress that white children were citizens of the United States upon birth. Beyond this there was dispute. Proponents of freedmen's rights seemed to believe that the Thirteenth Amendment itself made citizens of former slaves or at least entitled them to the same rights enjoyed by other free men. However, this view was vehemently denied by opponents of the legislation who held to the view that the abolition of slavery did not make citizens of former slaves. These opponents also argued that there was a difference between citizenship in the United States and citizenship of a state. The latter, they claimed, was the exclusive province of the respective states. They went so far as to argue that the bill was unconstitutional in attempting to confer citizenship by general statute and in intruding into state control of state citizenship. All these disputes were settled by the Fourteenth Amendment, obviously, which not only vested citizenship in all persons born in the United States but also vested them with state citizenship.

At the time of the legislative debates, however, it was understood by proponents and opponents alike that white persons already enjoyed citizenship by birth and that the office of the first clause of Section 1 was to confer citizenship by birth upon persons other than white persons, mainly upon freedmen. This was the understanding behind President Johnson's remarks in his veto message that the bill provided citizenship for new classes of persons who

were then vested with rights equal to those enjoyed by white citizens, all of which the President considered improvident. No one so far as we have discovered expressed the thought that the first clause of Section 1 provided anything new for the benefit of white persons born in the United States.

Thus the office of the first clause of Section 1 coincided with the function of the balance of the bill. The entire enactment was structured to alter the status of non-whites by providing them with citizenship by birth, by enumerating the classes of rights which they would enjoy to whatever extent that white persons enjoyed them, and by providing legal sanctions for those who prevented these persons from enjoying the same rights as white persons.

Another factor which somewhat contradicts the construction of the Act sought by Petitioners is the fact that the Act is confined to certain enumerated civil rights but does not include all civil rights or political rights. If Congress really intended the bill to confer rights upon white persons, it was somewhat anomalous to confer upon them fewer rights than they already enjoyed.

Finally, a good argument can be made that the intention of Congress can be divined from the fact that it was proceeding under the second section of the Thirteenth Amendment. Since the Thirteenth Amendment did nothing more than to abolish slavery and involuntary servitude in the United States, it is very doubtful that the Reconstruction Congress of 1866 considered that it had the authority to legislate for the enumeration and protection of rights of white citizens.

Our review of the legislative history of the 1866 Act is necessarily incomplete but it demonstrates that the items

relied upon by Petitioners and their supporters are not significant in light of the whole legislative record and much too fragile to support the striking revision of the language of the statute which is requested. With respect to Petitioners and their supporters, we must say that this Court is being requested to legislate.

District Judge Renfrew correctly capsulated the present situation of §1981 in *League of Academic Women v. Regents,* 343 F. Supp. 636 (N.C. Cal. 1972) thus:

> "Section 1981 was enacted to protect the rights of two groups of people—non-whites and non-citizens who were not afforded equal treatment to white citizens. The standard against which the rights of these individuals must be measured is the rights of white citizens. The change in language to include 'all people' was designed to include non-citizens and persons not born in the United States within the coverage of the Act. The amendment was not so broad as to extend coverage to all rights of all people. The 'all persons' language of the statute speaks only to the issue of to which persons the Act applies. It does not purport to delineate the rights accorded those individuals. The standard against which the rights of the protected individuals must be matched remains the rights of white citizens."
>
> * * * *
>
> "Where new forms of discrimination becomes apparent and the existing laws are not appropriate to deal with them, the legislature and not the courts has the responsibility and the power to fashion new laws to combat the discrimination."

Of course, the coverage of aliens was provided by amendment later in 1870 after passage of the Fourteenth Amend-

ment eliminated doubts that Congress had power to go beyond citizens in granting protection. *Guerra v. Manchester Terminal,* 350 F. Supp. 529 (S.D. Tex. 1972) affd. on this point 498 F.2d 641 (C.A. 5, 1974).

Decisions of this Court so far have not moved in the direction which Petitioners suggest, as is evident from holdings under §1982 which also derives from Section 1 of the Civil Rights Act of 1866 and also contains the same language "as is enjoyed by white citizens."

In *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 235, 237 (1969), a white property owner was held to have standing under 42 U.S.C. §1982 to sue for the redress of damages inflicted upon him because of his effort to uphold the right of a Negro to rent and enjoy the white person's property in an all-white neighborhood. The same holding was made earlier in a restrictive covenant case under the Fourteenth Amendment in *Barrow v. Jackson,* 346 U.S. 249, 259 (1953). In both cases this Court upheld the standing of white litigants to vindicate the rights of others—"non-Caucasians" in *Barrow v. Jackson,* supra, 348 U.S. at 259-60, and "minorities protected by §1982" in *Sullivan v. Little Hunting Park,* supra, 396 U.S. at 237.

In *Sullivan* the white property owner sustained direct injury to himself because of interference with his right to rent his own property to a negro, yet the Court found it necessary to determine the white person's standing to enforce the right of "minorities protected by §1982" to become renters of property in order to grant him relief.

Sullivan was applied by the Second Circuit in a §1981 case *DeMatteis v. Eastman Kodak Co.,* 511 F.2d 306 (C.A. 2, 1975). There a white plaintiff was held to have

a §1981 cause of action against his employer who forced him into premature retirement because he sold his house in a white neighborhood to a black fellow-employee. The court, citing *Sullivan,* held "a white person . . . who has been 'punished for trying to vindicate rights of [non-white] minorities . . . .' has standing to sue under §1981."

CONCLUSION

Respondent Union prays that the judgment be affirmed.

Respectfully submitted,

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